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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 648

JAMES AVERY,

Appellant,

vs.

STATE OF GEORGIA,

Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 648

JAMES AVERY,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James Avery, in support of his petition for a writ of certiorari to review final judgment of the Supreme Court of Georgia, entered April 14, 1952, (opinion set out R. 45-60, also 70 S. E. 2d 716) following which petition for rehearing (omitted from printed record (see Clerk's note, R. 60)) was filed April 23, 1952, and denied May 14, 1952, (R. 60) affirming his conviction for rape under Georgia Code, Section 26-1301 (see note) followed by sentence of death under Georgia Code, Section 26-1302 (see note) which conviction and sentence took place in the Superior Court of Fulton County, Georgia, respectfully shows:

NOTE.—Text of section is set out at conclusion of petition.

A

Summary Statement of Matter Involved

I. GENERALLY

This petition is brought on the issue of whether discrimination against members of the Negro race has been practiced in any phase of the trial procedure by which defendant was convicted and sentenced to death. It is primarily directed to the practice in Fulton County of having the names of White persons in the jury box from which jurors are drawn written on white tickets and the names of Negro jurors in the said box written on yellow tickets, especially in view of the fact that the judge and subordinate court officials are able to observe this fact while the jury is being drawn. It is brought in the light of facts set out in the record, and recognized in the opinion of the Supreme Court of Georgia (R. 39, 46, 47) as to the proportionate numbers of Negro citizens

1. Residing in Fulton County,
2. On the Tax Receiver's digest of Fulton County (from which the jury is selected under Georgia Code, # 59-106 (see note),
3. On the jury list of Fulton County, and
4. On the panels from which the jury was struck that tried James Avery, all of which are shown by the following table, to-wit:

Class of Persons	Number of Persons	Number of White Persons	Number of Negro Persons	Percentage of Negro Persons
Residents of Fulton County	691,797	505,983	165,814	25
On Tax Receiver's Digest of Fulton County	122,771	105,035	17,736	14
On Jury List of Fulton County	21,624	20,509	1,115	5
On Panels from Which Jury was Struck	60	60	0	0

Defendant contends that this result is impossible under a system of fair and indiscriminate selection and that the above mentioned practice evidences and facilitates discrimination.

II. Chronology of the Case

The defendant, a Negro man, was charged with having committed the offense of rape upon, a White woman, Mrs. M. L. Hollingsworth on October 29, 1950 (R. 1). According to the evidence of the prosecutrix, the offense occurred in the evening. He was arrested at 9:00 or 10:00 P. M. that night, taken to jail immediately at LaFayette, Walker County, Georgia, the county seat of the county where the alalleged crime was committed. About 10 minutes after he arrived at the Walker County jail a car with four men in it stopped there. Three got out. One went to the kitchen door. He ran back to the car when he found that the sheriff was waiting for him in the kitchen. The lights were out in the kitchen. They drove off without lights. The sheriff immediately thereafter moved the defendant 30 miles to another jail and a day or so later he was moved to the jail in Atlanta, Georgia. Motion on the ground that there was danger of lynching and that a fair trial could not be had there (for change of venue) was filed on February 21, 1951, and overruled on February 26, 1951. This denial was appealed to the Court of Appeals of Georgia and this judgment was reversed on April 10, 1951, the decision being reported in *Avery* v. *State*, 83 Ga. App. 700, 64 S. E. 2d 589, the foregoing facts being set out in said opinion. Challenge to the array of grand jurors in Walker county was made and overruled (R. 45, 46). Bill of exceptions pendente lite as to the overruling of the challenge was filed on February 21, 1951. Order granting change of venue to the Superior Court of Fulton County, Georgia, was granted (R. 46). Challenge to the array of traverse jurors in Fulton County, Georgia,

was filed on September 17, 1951 (R. 3), as were a traverse to the challenge (R. 11) and a demurrer to it and motion to strike it (R. 10), and, on September 18, 1951, the demurrer was sustained as to part of the charges in the challenge and the remaining grounds of the challenge were overruled after evidence was heard (R. 9, 32).

He was tried from September 17, 1951, through September 20, 1951, and found guilty without recommendation and sentenced on that date to electrocution. Motion for new trial was also filed on that date. Amended motion for new trial was filed on January 11, 1952, and both motions for new trial were denied on that date. The case was then appealed to the Supreme Court of Georgia, bill of exceptions being filed on January 24, 1952. The foregoing facts are set out in the bill of exceptions (R. 35, 37-40). Judgment was affirmed on April 14, 1952, one justice concurring specially and two dissenting (R. 45-60), and motion for rehearing was filed on April 23, 1952, and denied on May 14, 1952 (see Clerk's note, R. 60). Petition to stay remittitur was granted May 15, 1952 (R. 62).

Under the ruling in *Gypsy Oil Company* v. *Escoe*, 48 S. Ct. 112, 275 U. S. 498, 567, and *Morse* v. *United States*, 46 S. Ct. 241, 270, U. S. 151, the date of final judgment was postponed from the date of the original opinion until the date of the denial of the motion for rehearing, said motion for rehearing having been filed within the 10 day period allowed by law (Georgia Code, #24-4544, par. (a) (see note)) and this petition is, therefore, timely in that it is brought within 90 days as provided under Rule 38½ of this court and 28 U.S.C. #2101, par. (c), this being a State criminal case.

III. Summary of the Evidence

Now, let us look to the testimony.

Mr. George A. Campbell, of the Board of Commissioners

Note.—Text of section is set out at conclusion of petition.

who revised the present Fulton County jury list, testified as follows:

> "*Question:* Now, if you have in mind that making the tickets yellow would more easily locate a person, explain why you don't make them all yellow.
>
> "*Answer:* Well, the White people are made on the white tickets and if you make them all alike *you have no way of discriminating,* or, rather, deciding which is white and which is colored." (R. 15, 16)

and testified further:

> "*Question:* Now, let's go into the general experience; let's have your full views about that, please. What did your general experience have to do with placing of names on yellow paper?
>
> "*Answer:* The experience that if you knew whether a man was colored or white when you went looking for him, *it was much easier to eliminate him on account of his color* and look him up where he lived." (R. 17)

Mr. Campbell, in the course of being examined as to why white and yellow tickets were used, said,

> "It has been the custom for fifty years or more to do that and we agreed that would be to a big advantage in locating these people from the lists that they are on, if we knew whether or not they were white or colored. * * * (R. 14, 15)

By the Court:

> "*Question:* I understand you to say for the convenience of locating them?
>
> "*Answer:* That is true. I say we thought further that it would be better to have it that way. As to whether that was the reason for doing it fifty years ago, for the convenience of locating them, I didn't do it fifty years ago. While I am testifying as to the practice and custom and not familiar with why they did it fifty years ago, they might have had a different idea then (R. 15)".

Mr. Campbell testified further on the general subject as follows:

"As to what stage in our procedure that we used the yellow list, well, we started first, I wouldn't swear this, but I think we started on the colored list first, went over that list and took the ones we thought were eligible for jury duty. We took the yellow sheets from the Tax Digest, and we first wrote the names down on white sheets, then when we made the cards for the jury box, we put them on colored cards. In addition to putting the man's name from the Tax Digest on the card or the sheet, we put his address and we got that from the Tax Digest, usually". (R. 17)

"Question: And if you had that information and the address was on there and his name was on that part of the Tax Digest that is required by the Constitution to be yellow, why didn't you just put his name on a white piece of paper with the White folks and put it in the box?

"Answer: For the same reason I just explained to you. When the cards are turned over to the sheriff's office, if he didn't have yellow cards and white cards he wouldn't know whether they were white or black. As to what my duties as a member of the Board of Commissioners had to do with turning over cards to the sheriff's office, well, I didn't turn them over.

"Question: What concern was it of your Board of Commissioners whether or not the Sheriff's office was going to have any difficulty in locating a man?

"Answer: Because I had heard them complain of it.

"Question: You had heard them complain?

"Answer: Yes.

Question: So you merely wanted to be helpful to the Sheriff?

"Answer: Sure." (R. 17, 18)

It appears further from the testimony of Mr. Campbell that Mr. Simmons, Clerk of the Superior Court of Fulton county and ex-officio Clerk of the Jury Commissioners,

turned this list of names over to the printer who printed them on white and yellow tickets, respectively, and that the names were not checked against the original list when they were turned over to the printer. It was admitted that mistakes in printing would be possible. (R. 19)

Mr. Simmons testified that a deputy clerk and not he personally attended to the original typing of the jury list from the tax receiver's digest. He testified specifically:

> "We employed a group of young women assistants who went through these returns and made a card on each return showing the name and address, if the return showed it, the property and so on, and information they took off in condensed form for the jury commission. After they had prepared a number of these cards, the commission would meet and take these cards and study them, the information contained on them, and make a selection. If they selected a certain name, that name was given to Mrs. Truitt who typed it, and she kept in that manner a typewritten list of all the names selected at different meetings of the commission. Now, do you want me to go ahead and complete the story? When the jury commission had completed its work—some few days before they completed the work they told me the approximate number of names that would be in the list, just in round numbers, and I asked the purchasing agent to obtain bids on the printing of these names on tickets. Well, when the list was finally completed, that list of names was furnished to the printer and when the printer returned a proof to the jury commission, and upon the completion of the checking, the proof sheets were sent back to the printer with such corrections, if any, that were made on it, and he then printed those lists. Now, we have in this county three jury boxes. The printer was requested to print four copies of the list, the petit jury; three of those copies were cut up into tickets for the three jury boxes; one copy was retained and placed in this binder. They printed two copies of the grand jury list, one for the grand jury

box and one to be placed in this binder. When the printer notified us that the printing was ready, the jury commission went to the printing office. I went with them and we carried the four jury boxes, the grand jury box, the Superior Court jury box, Civil Court jury box, and box for the Criminal Court of Fulton county, and in my presence and in the presence of the jury commission, these sheets were cut up by cutting them into strips and then cutting this way, making tickets out of them, and these cuttings were placed in the three separate boxes. One grand jury list was cut up in that same manner and put in the grand jury box and this certificate was prepared and one copy of the printing was put in this binder and the certificate attached to it. The young ladies who are employed are in the Commissioners' office, the Jury Commissioners' office. They take in the first instance the tax returns and take off information and make a card for the Board of Jury Commissioners. We have these cards in the office. I don't know whether or not the Board of Jury Commissioners themselves check the information taken by the clerks employed by them from the tax returns turned over by the Tax Receiver. I did not, as Clerk of the Board of Jury Commissioners, ever do it myself (R. 21-23). * * *

"From the cards made up by the clerks, the Jury Commissioners then decide who they will select for jury service. I am not certain whether yellow cards are made by these clerks in taking the names of Negroes off the tax returns or whether they are white. I will have to check them and see. After the Board of Jury Commissioners decide who they will select from the cards prepared by their employees, they make up the list and I take the list to the printer. After the Jury Commission has finished the task of selecting names and set it on a list, we send to the printer a typewritten list of those names. The names that the Jury Commissioners select are the names that appear on the cards taken by these ladies or these clerks who they employ to take the information from the tax returns and the

names are put on a list when they make a selection and taken to the printer and the printer prints the list, but he first makes up a proof which is sent to the Jury Commissioners for verification, and the Jury Commissioners have a copy of the list that they sent to the printer, they make it up in duplicate, make carbon copies of it. Then that list goes back to the printer for printing, the proof sheet that goes back with such changes or corrections as the Jury Commission has made to the printer, and from that corrected list he prints the names that go in the jury boxes.

"I instruct the printer to print the names of the Negroes on the yellow sheets.

"Question: Then actually the address of the man selected, the Negro juror has already been found and determined, he has already been selected, and the yellow sheet doesn't help anyone to locate him at all because he has already been selected; isn't that true, at the time the yellow sheets are made?

"Answer; He has already been selected as a prospective juror.

"Question: Then the fact that his name was put on a yellow sheet wouldn't be of any assistance in helping anyone determine whether he could be located as a prospective juror?

"Answer: Well, that is a problem for the process server. If he knows that man is white or that man is colored, he can locate him easier.

"Question: Does the process server have access to those yellow tickets in the jury box?

"Answer: Nobody has access.

"Question: Then he wouldn't know from the yellow sheet, that wouldn't be of any assistance to him, would it?

"Answer: Well, when a jury is drawn by a judge from the box, if he draws a yellow ticket out, a notation to that effect can be made on the drawn list and he would know it.

"Question: Well, he could make that if it was on a white piece of paper, could do the same thing?

"Answer: Why, certainly, he could make one white and one colored if he wanted to. If the word colored was indicated on the white slip when that name was picked up by the person drawing the jury and read off, there is nothing to prevent the board putting his address under that. I don't know any reason why it couldn't be done. I would think that would serve the same purpose as having a yellow ticket to designate him as a Negro". (R. 23-24)

Mr. Simmons, when on cross examination, testified that he had been Clerk of the Superior Court of Fulton county for 22 years and that an estimated six to eight Negroes were actually impaneled each week that juries were called and that five had served on the grand jury during the preceding term although there were none on the grand jury in service at the time. (R. 25)

Judge Moore of the Fulton County Superior Court testified as to the drawing of the jury as follows:

"The jury box is brought to the judge's chambers in the court room by the Deputy Sheriff and we have a Deputy Clerk who is a young lady and a typist; she comes up and the jury box is unlocked and the seal broken by the judge and the jury is in two divisions, box no. 1 and box no. 2. We take the tickets with the names on them out of No. 1. I don't know how the other judges do but I reach down and pick up maybe two or three or half a dozen tickets and put them in a little box which we have for that purpose. After I get a number in there, say forty or fifty, or something like that, they are turned over to the Deputy Sheriff who turns them over to the Deputy Clerk who makes a typewritten list of them. Those that are put on the list are put back in box no. 2 or *apartment* no. 2, the jury box, and then some more are taken out until we get the required number. We generally draw from 150 to 200 jurors for each division of the court, that is the Civil and Criminal divisions. That is the operation." (R. 28, 29)

. . . . . .

"Question: Now, as you draw the tickets out of compartment no. 1, two or three at a time, do you read the names on those tickets?

"Answer: I do not.

"Question: Do you look on those tickets?

"Answer: Sometimes I do and sometimes I don't." (R. 29)

. . . . . .

"Answer: Well, the Deputy Sheriff, I turn them over to him and he takes them and arranges them and puts them over to the Deputy Clerk.

"Question: No one knows what names you have put in the cigar box (the box referred to in witness' preceding testimony where the tickets are placed while the jury is being selected) until the Deputy Clerk or the Deputy Sheriff gets them arranged, is that it?

"Answer: Well, you would know if you looked at them, I don't know them, I don't really know after they make the list unless I read it over, who is on there; very often I have drawn my own brother and not known he was on it until he appeared here.

"The deputy sheriff puts the names out in front of the typist who is a deputy clerk, so she can type them. He puts every name out before the typist that I draw from the jury box by putting them on her desk, puts them out in front of her, and I am right there when that is going on, and I am there for the completion of the whole process all the way through, the whole time, yes, sir. When the stenographer has copied off the tickets on the list, the deputy puts them in a little cigar box marked No. 2, which is another box which is No. 2 and when they get through copying them, then I take that and put those tickets back in compartment No. 2 of the jury box." (R. 29, 30)

. . . . . .

"Question: Now, Judge Moore, when you draw these tickets out of the panel No. 1 of the jury box, do you ever notice any yellow tickets?

"Answer: Some yellow tickets in there, yes, sir.

"Question: Are those tickets visible to you as you lift the tickets out of the panel No. 1?

"Answer: Yes, sir." (R. 30)

Judge Moore then testified that he did not know any reason for the use of white and yellow tickets other than custom and that the difference in the color of the tickets did not affect him in drawing a jury. He then testified on cross-examination:

"I have been judge of this court—on my twenty-fifth year now. I have petit jurors that are colored here in court. Sometimes we have an entire panel or more. I think it was five colored grand jurors last time here. It is a common practice for both colored and white to serve on the jury. It certainly is, it occurs very often." (R. 31)

And, finally, the testimony on redirect was as follows:

"Question: I don't know whether I made it clear—it is not clear to me—after you draw the name and give it to the typist or the deputy to give to the typist to type, do you make any inspection of the specific name that you have withdrawn from panel No. 1 in the jury box to make sure that the name is copied on the list by the stenographer and the Deputy Clerk?

"Answer: Well, I can't say that I watch every ticket as it is put down; I give it to them and they are there working under my supervision and I suppose if they wanted to slip one in the wastebasket or something they could do it without my seeing it, but I am there supervising and of course a judge can't watch everything." (R. 31)

Now, let us examine the various operations that go into the making of the final jury list from the list of names on the tax receiver's digest, as shown by the testimony herein quoted. It will disclose that there is no substantial conflict on these points:

1. The Board of Jury Commissioners employed clerks to go through the tax receiver's digest and take down the names and addresses and amount of return of the persons on this list on cards. (No specific inquiry was made as to whether the names of all persons on the tax receiver's digest were taken down or not). The Clerk of the Court (and of the Commission) did not recall whether this original list of cards from whom the jury was selected was printed on different colors as to Negroes and White persons, and this matter was not investigated further.

2. The Jury Commissioners went over the cards and selected the names of persons whom they considered eligible for jury service, and gave them to a deputy clerk who typed them. It appears that the Negroes were selected first.

3. The Clerk of the Superior Court secured bids from various printers for the printing of this typed list of names and addresses.

4. The list of names and addresses was returned to the printer and he printed a list and returned a proof to the Board of Jury Commissioners.

5. After the Commissioners checked the list it was sent back to the printer, who printed the final list. The Clerk of the Superior Court personally instructed the printer to print the names of Negro jurors on yellow paper or cards.

6. When the list was printed the jury commissioners took the jury boxes to the printer and cut up the printed list into strips so as to make tickets and placed the tickets in the jury boxes.

The foregoing completed the procedure of preparing the tickets. Let us now summarize the procedure of drawing the jury as testified to by Judge Moore:

1. The jury box is left in the court room by the deputy sheriff. A deputy clerk, who is also a typist, is there.

2. The seal is broken by the judge.

3. The judge reaches down and takes out a few tickets at a time and places them in a box until 40 or 50 are withdrawn.

4. They are turned over to a deputy sheriff who arranges them and turns them over to a deputy clerk. Just what is meant by "Arranging" is not clear from the testimony.

5. The deputy clerk makes a typewritten list, which is the final jury list.

6. The tickets are placed back in the second compartment of the jury box.

IV. The Contentions of Defendant on Appeal

Constitutional objections have been raised to each step in the process of jury selection in both Walker and Fulton Counties by challenge to array in each county, to-wit:

1. The consistent practice throughout the years of having selected White persons only as jury commissioners, both in Walker County (where the grand jury that indicted James Avery was impaneled) and Fulton County (where the traverse jury that convicted James Avery was impaneled); (R. 6, 50, 51)

2. The limitation of jury service to persons on the tax receiver's digest (being an attack on Georgia Code # 59-106 (see note), which requires this method of selection) (this practice reducing the percentage of Negro jurors potentially available from 25 to 14 as shown above); (R. 3-5, 49, 50); and

3. The deliberate and systematic exclusion of a proportionate number of Negro persons whose names appear on the Tax Receiver's list from selection on the jury list on account of their race (this practice being evidenced by reduction of the above mentioned 14 per cent of Negro population available for jury duty according to the Tax Receiver's digest to the above mentioned 5 per cent whose names actu-

Note. Text of section is set out at conclusion of petition.

ally go into the box and who are theoretically available for service. (R. 7, 52)

The record discloses that petitioner contended on these challenges, to which reference is here made, that each and all these matters, separately and cumulatively, constituted an unconstitutional discrimination against defendants of the Negro race in that they resulted in a substantial exclusion of Negro citizens from availability to try other Negro citizens, because of their race, and can only be the result of conscious elimination of a large number and proportion of Negro citizens from availability for this purpose. We do not present these questions as a basic question upon which we rely in this application for certiorari. We do, however, respectfully invite the continued remembrance of the Court of these matters in the consideration of the basic questions that we present, to-wit: the question of whether, after all this has been done, the further practice of writing the names of Negro jurors on yellow tickets and those of White jurors on white tickets and placing these tickets in the box where their color is immediately visible and the race of the person whose name is printed thereon is immediately known to the drawer of the jury before he even places his hand in the box can be other than a sham and fraud to deprive, and make it easily possible for others to deprive, Negro defendants from even having a fair and discriminate selection of citizens of his own race selected for jury service from the remnant left in the box.

B

Statement of the Jurisdiction of This Court

I. Statutory Provisions Believed to Sustain Jurisdiction

The Supreme Court of the United States has jurisdiction of this case under the provisions of 28 U. S. C. Sections 1257 and 2101.

II. Statement of Nature of Case and Rulings of the Supreme Court of Georgia Bringing the Case Within the Jurisdiction of This Court

The nature of this case has already been fully stated. The decision of the Supreme Court of Georgia, which is embraced in the record (R. 45-60) is reported in 70 S. E. 2d 716. We invite the attention of this court to the opinion as a whole, and specifically to the rulings as to the yellow tickets, as follows:

> "And while the statute (Georgia Code, #59-106 (see note)) does not say so, its manifest intention is that the tickets shall be of uniform size and color, so as to make discrimination impossible in the drawing of jurors, and where not so done, this is prima facie evidence of discrimination, and, if nothing else appeared, would require a reversal." (R. 52, 53)

but explains its decision refusing to grant a reversal by saying:

> "In this case, however, it is not charged or contended that any discrimination was practiced in drawing the challenged jurors; and the judge who drew them, as a witness for the accused, testified that there was in fact none. Therefore, the practice of placing the names of white and colored jurors in the jury box on tickets of different colors did no harm in this instance and consequently furnished no sufficient objection to the jurors challenged by the accused." (R. 53)

The concurring opinion stated:

> "There is neither constitutional nor statutory authority for the use of a different color paper in placing the names of colored jurors in the jury box. This practice could serve only one purpose, to-wit, discrimination in the drawing of the names of colored jurors

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Note.—Text of section is set out at conclusion of petition.

from the box. Prima facie such practice is wrong and should be discontinued at the first opportunity to revise the jury list. The testimony of Judge Moore as to the method in which the jurors are drawn is sufficient to show that the defendant was not harmed in this case since there was no discrimination against colored jurors in the selection of the traverse jurors." (R. 59, 60).

and the dissenting opinion stated:

"I can not agree with the ruling in subdivision (b) of division 2 for the reason, in my opinion, this practice is conclusive evidence of discrimination and for that reason the case should be reversed.

"I am authorized to say that Presiding Justice Atkinson joined me in this dissent." (R. 60).

III. Cases Believed to Sustain the Jurisdiction of This Court

Defendant respectfully maintains that the following cases, to-wit:

Crumb v. *State*, 205 Ga. 547, 54 S. E. 2d 639;
Negl v. *Delaware*, 103 U. S. 370, 397;
Norris v. *Alabama*, 294 U. S. 587, 55 S. Ct. 579;
Pierre v. *Louisiana*, 306 U. S. 354, 59 S. Ct. 536;
Hill v. *Texas*, 316 U. S. 400, 62 S. Ct. 1159;
Patton v. *Mississippi*, 332 U. S. 463, 68 S. Ct. 184

sustain the jurisdiction of this Court, together with numerous cases cited therein. For the purposes of this petition, however, defendant will set out only the following excerpts:

Patton v. *Mississippi*, *supra*:

The test of whether there has been discrimination in jury selection in violation of the equal protection clause of the 14th Amendment is (p. 186):

> "Whether there has been systematic racial discrimination by administrative officials in the selection of jurors",

and this case further holds that the answer to this question must be determined (p. 186):

> "from the facts in each particular case"

because (p. 187):

> "When a jury selection plan, whatever it is, operates in such a way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand."

In this connection it is held in *Hill* v. *Texas, supra,* (p. 1162):

> "No state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution and an act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty."

C

Questions Presented

The Jury Commissioners of Fulton County, Georgia (Atlanta) for the past 50 years as one of their official procedural steps in making up a petit jury, have printed the names of White jurors on white slips of paper, and the names of Negro jurors on yellow slips of paper, all of which are placed in a box from which the jury is drawn.

The Judge of the Superior Court when drawing the trial panel from this box has a clear view of the slips before drawing any slip therefrom.

Question 1. Is this practice, inherently and without more, on its face, such a sham and mere device designed and calculated to circumvent the due process and equal protection clauses of the 14th Amendment to the United States Constitution and the State and Federal decisions forbidding discrimination against members of the Negro race in the selection of juries as to invalidate the conviction of a Negro by a jury so selected.

Question 2. Does this practice constitute or result in such discrimination prohibited by the United States Constitution and decisions of the United States Supreme Court and the Supreme Court of the State of Georgia as to invalidate conviction under the facts of the present case.

D

Reasons Relied On for Granting Writ

It will be remembered that under Rule 38, Paragraphs 5 and 5 (a) of this Court, it is provided that:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court."

Defendant respectfully submits that his case comes within the teeth of the foregoing rule, to-wit, that the decision involves a Federal question of substance, which is whether, under the facts, there has been a denial of equal protection of the laws by the State to the defendant in violation of the 14th Amendment by the practices to which reference is

hereinabove made, it being the further contention of the defendant that the case at bar is not in accord with the cases herein cited on the subject. There are special and important reasons for granting this writ in that a man's life is at stake, and that the decision herein will not only determine whether this life is to be forfeited by procedures such as this, but also the lives and liberties of countless other persons of the Negro race who will follow him to judgment by the courts of Fulton County, Georgia.

What other purpose than discrimination, we ask, could the practice serve? What result did it have? Can the fact that not one Negro juror appeared in a panel of 60 be explained on any other basis when Negroes constituted 1 out of 4 of the population, 1 out of 7 on the Tax Receiver's Digest, and even 1 out of the 20 that originally went into the jury box. Can this Court sanction a practice by which a means is provided whereby even the most ignorant could perpetrate a fraud and discrimination, with knowledge of the fact that the final result is such that it can not be sensibly explained by mathematical formulae or coincidence in the absence of discrimination, but can only be explained as a consequence of such discrimination? Can this Court close its eyes to the result in determining the validity of the practice? Can it, above all, sanction the practice in the light of the result?

The statutory provisions as to the functions of the Clerk of the Superior Court with respect to the selection of juries are rather sparse as far as the problems of this case are concerned, and consist of the following language of Georgia Code, #59-104 (see note), to-wit:

"The clerk of the Superior Court shall be the clerk of the Board of Commissioners, and shall perform all the clerical duties required by law."

NOTE.—Text of section is set out at conclusion of petition.

Except for the service of jury summonses, the law of Georgia contains no provision conferring upon the sheriff any duty with reference to the selection or procurement of jurors. Yet a deputy sheriff helped in the drawing of the jury.

Now, it will be observed from the foregoing that there were two main reasons assigned for the practice of using the yellow tickets, to-wit:

1. Custom.

2. To make it easier for the sheriff to locate the prospective juror. These things were confirmed; for all practical purposes, by all witnesses who testified with regard to the subject.

It should be observed, however, that the inadequacy of these explanations was spotlighted by the further testimony of Mr. Simmons (Clerk) that the same purpose could as easily have been effectuated by writing the names of Negro jurors on white tickets with a memorandum of the fact that they were Negroes, because the process server did not even see the yellow ticket but only the name that was taken from it, which was typed on a white sheet of paper with the memorandum that the person to be summoned was a Negro or a White person.

It will be further remembered from the testimony hereinabove quoted that the unguarded truth fell twice from the lips of Jury Commissioner Campbell, in that he stated that the purpose of the yellow tickets was to "discriminate" (R. 16) and "eliminate" (R. 17). Defendant submits that his explanation fell short.

Defendant acknowledges that, had this method of printing tickets been used, and had a substantially similar proportion of Negro persons been found at all places from the Tax Receiver's digest to the final jury panel, the color of the

tickets upon which the respective names were printed would be immaterial, but such is not the case.

All justices of the Supreme Court of Georgia recognized the inherent wrong in the practice, as hereinabove shown. We respectfully submit that it is the duty of this Court to right the wrong.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of Georgia, commanding said Court to certify and send to this Court a full and complete transcript of the record, and the proceedings of said Supreme Court of Georgia in the case numbered and entitled on its docket No. 17,810, JAMES AVERY, appellant, v. STATE OF GEORGIA, appellee, to the end that said case may be reviewed and determined by this Court and that your petitioner may have such other and further remedies as this Court may deem appropriate and that the said judgment of said Supreme Court of Georgia may be reversed by this honorable Court.

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GEORGE PAUL SHAW,
Attorneys for petitioners.

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102 Howard Street,
Rossville, Georgia.

SHAW AND SHAW,
Lafayette, Georgia.

APPENDIX

TEXT OF STATUTES CITED

GEORGIA CODE, # 26-1301

"Rape is the carnal knowledge of a female, forcibly and against her will."

GEORGIA CODE, # 26-1302

"The crime of rape shall be punished with death, unless the defendant is recommended to mercy by the jury, in which case the punishment shall be for not less than one nor more than 20 years."

GEORGIA CODE, # 59-106

"Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as traverse juror, such name shall be returned to the box and another drawn in its stead."

GEORGIA CODE, # 59-104

"The clerk of the superior court shall be the clerk of the board of commissioners, and shall perform all the clerical duties required by law. Before entering upon the per-

formance of his duties as clerk of said board he shall take an oath, before the ordinary, to faithfully discharge his duties as required by law, and that he will never divulge any of the proceedings and deliberations of the jury commissioners, unless compelled to testify thereof in some court in this State."

GEORGIA CODE, # 24-4544, PAR. (a)

(a) The Court may by special order in any case direct that the remittitur be transmitted to the clerk of the trial court immediately after the rendition of the decision and judgment, or at any other time, without awaiting expiration of the usual period of 10 days, and may otherwise by special order limit the time within which a motion for rehearing may be filed to any period less than 10 days, counsel in such cases to be notified. Unless an extension of time is requested and granted, a motion for rehearing must in any event be filed within 10 days from the rendition of the decision and judgment, regardless of whether the remittitur has been transmitted to the lower court.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 648

JAMES AVERY, *Petitioner*,

versus

STATE OF GEORGIA, *Respondent*

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of Court Below

The opinion of the Court below, the Supreme Court of Georgia, *James Avery* v. *State of Georgia*, Case No. 17, 810, filed April 14, 1952, now set out as R. 45-60, is now reported as 70 S. E. 2d 716.

Jurisdictional Statement

The judgment of the Supreme Court of Georgia was entered April 14, 1952. Petition for rehearing was filed April 23, 1952, and denied May 14, 1952. Jurisdiction of this Court rests on Sec. 1257, Title 28, U. S. C., and Sec. 2101, Title 28, U. S. C.

Questions Presented

The jury commissioners of Fulton County, Georgia, (Atlanta) for the past 50 years as one of their official proce-

dural steps in making up a petit jury, have printed the names of White jurors on white slips of paper, and the names of Negro jurors on yellow slips of paper, all of which are placed in a box from which the jury is drawn.

The Judge of the Superior Court when drawing the trial panel from this box has a clear view of the slips before drawing any slip therefrom.

Question 1: Is this practice, inherently and without more, on its face, such a sham and mere device designed and calculated to circumvent the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and the State and Federal decisions forbidding discrimination against members of the Negro race in the selection of juries as to invalidate the conviction of a Negro by a jury so selected?

Question 2. Does this practice constitute or result in such discrimination prohibited by the United States constitution and decisions of the United States Supreme Court and Supreme Court of the State of Georgia as to invalidate conviction under the facts of the present case?

Statutory and Constitutional Provisions Involved

GEORGIA CODE, # 59-101:

> "There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the Superior Court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time in his discretion, for cause, and appoint a successor: Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners."

GEORGIA CODE, # 59-104:

"The clerk of the superior court shall be the clerk of the board of commissioners, and shall perform all the clerical duties required by law. Before entering upon the performance of his duties as clerk of said board he shall take an oath, before the ordinary, to faithfully discharge his duties as required by law, and that he will never divulge any of the proceedings and deliberations of the jury commissioners, unless compelled to testify thereof in some court in this State."

GEORGIA CODE, # 59-106:

"Biennially, or if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

"The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

GEORGIA CODE, # 59-108:

"The jury commissioners shall place the tickets containing the names of grand jurors in a box to be provided at the public expense, which box shall contain compartments marked number "one" and "two", from which grand jurors shall be drawn, and the jury com-

missioners shall place the tickets containing the names of traverse jurors in a separate box, from which traverse jurors shall be drawn."

GEORGIA CODE, # 59-109:

"The clerk of the superior court shall make out, in a book, lists of the names respectively contained in the grand jury box and in the traverse jury box, alphabetically arranged, and place the book in his office, after the lists therein have been certified by the clerk and commissioners to contain, respectively, all the names placed in the jury boxes."

GEORGIA CODE, # 59-203:

"The judges of the superior courts, at the close of each term, in open court, shall unlock the box, and break the seal, and cause to be drawn from compartment number "one" not less than 18 nor more than 30 names to serve as grand jurors at the next term of the court; all of which names shall be deposited in compartment number "two"; and when all the names shall have been drawn out of compartment number "one", then the drawing shall commence from compartment number "two", and the tickets shall be returned to number "one" and so on alternately; and no name so deposited in the box shall, on any pretense whatever, be thrown out of it, or destroyed, except when it shall be satisfactorily shown to the judge that the juror is dead, removed out of the county, or otherwise disqualified by law."

GEORGIA CODE, # 59-701:

"Petit juries shall be selected, and their names placed in a box, as provided in sections 59-106 and 59-108. At the same time, and in the same manner, that grand juries are drawn, the judge of the superior court shall draw out of the same compartment of the jury box 36 names to serve as petit jurors for the trial of civil and criminal cases; and such petit jurors shall be sum-

moned in the same manner as is provided in section 59-206 for summoning grand jurors."

GEORGIA CODE, # 59-206:

"Within 30 days after the grand jurors shall have been drawn by a judge of the superior ocurt, and within five days after they may have been drawn by the ordinary and commissioners, as provided in section 59-205, the clerk of the superior court shall issue and deliver to the sheriff, or his deputy, a precept containing the names of persons drawn as grand jurors; and upon the receipt of the precept, the sheriff or his deputy shall cause the persons whose names are therein written to be served personally, or by leaving the summons at their most notorious places of residence, at least 10 days prior to the term of the court the jurors were drawn to attend."

GEORGIA CODE, # 59-703:

"The judges of the superior courts, at each term, shall, from the petit jurors, have made up two panels of 12 jurors each, which shall be known and distinguished as panels "number one" and "number two"; all cases in said courts shall be tried by one or the other of said panels if the parties shall agree upon a panel. If the parties shall not agree upon a panel, the clerk shall furnish the parties or their attorneys a list of both panels, from which the parties or their attorneys may strike alternately until there shall be but 12 left, which shall constitute the jury to try the case. In all cases the plaintiff shall have the first strike."

GEORGIA CODE, # 59-801:

"When any person shall stand indicted for a felony, the court shall have impaneled 48 jurors, 24 of whom shall be taken from the two panels of petit jurors, from which to select the jury. When the regular panels of petit jurors, or either of them, cannot be furnished to make up panels of 48 for the trial of felonies, because

of the absence of any of such panels, where they, or any part of them, are engaged in the consideration of a case, the presiding judge may cause the panels to be filled by summoning such numbers of persons, who are competent jurors, as may be necessary to make full the said panels. If the jury shall not be made up from said panel of 48, the court shall continue to furnish panels, consisting of such number of jurors as the court, in its discretion, may think proper, until a jury shall be obtained. In making up said panel of 48 jurors, or successive panels of any number, the presiding judge may draw the tales jurors from the jury boxes of the county and order the sheriff to summon them."

GEORGIA CODE, # 59-802:

"The clerk shall make out three lists of each panel, and furnish one to the prosecuting counsel and one to the counsel for the defense. The clerk shall then call over the panel, and it shall be immediately put upon the accused."

GEORGIA CODE, # 59-803:

"The accused may, in writing, challenge the array for any cause going to show that it was not fairly or properly impaneled, or ought not to be put upon him; the sufficiency of which challenge the court shall determine at once. If sustained, a new panel shall be ordered; if not sustained, the selection of jurors shall proceed."

GEORGIA CODE, #2-5102: (Constitution of Georgia of 1945, Art. VI, Sec. XVI, Par. II):

"The General Assembly shall provide by law for the selection of the most experienced, intelligent, and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. Nevertheless, the grand jurors shall be competent to serve as traverse jurors. The General Assembly shall have the power

to require jury service of women also, under such regulations as the General Assembly may prescribe."

GEORGIA CODE, #26-1301:

"Rape is the carnal knowledge of a female, forcibly and against her will."

GEORGIA CODE, #26-1302:

"The crime of rape shall be punished with death; unless the defendant is recommended to mercy by the jury, in which case the punishment shall be for not less than one nor more than 20 years."

GEORGIA CODE, #27-2502:

"The jury in their verdict on the trial of all cases of felony not punishable by life imprisonment shall prescribe a minimum and maximum term, which shall be within the minimum and maximum prescribed by law as the punishment for said crime, and the judge in imposing the sentence shall commit said convicted person to the penitentiary in accordance with the verdict of the jury. The Prison Commission shall fix rules by which said convict, after serving the minimum sentence, may be allowed to complete his term without the confines of the penitentiary upon complying with said rules."

UNITED STATES CONSTITUTION, AMENDMENT 14:

"Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

The issues presented in this case have largely been set out in the petition for certiorari. Attention is again called to the fact that, out of a Negro population in Fulton County, Georgia, comprising 25 per cent of the whole, only 14 per cent were legally available to serve on juries in the first instance because of the statutory requirement that the jurors be taken from the list of names on the Tax Receiver's books. This percentage is reduced further to five when the names of jurors, which are put in the box from which juries are drawn, are selected from the Tax Receiver's books, by the jury commissioners. No Negro person has ever served as a jury commissioner in Fulton County, where Atlanta is located.

The jury is selected from this five per cent of Negroes and 95 per cent White persons and then the Negroes' names are placed on yellow tickets to distinguish them from the White persons' names which are printed on white tickets. In the course of handling this five per cent from the time that the jury commissioners finish with it until the time that the jurors are selected to try cases the names of the prospective jurors are handled by printers, deputy clerks, and deputy sheriffs, in addition to judges and jury commissioners. (See petition for certiorari.)

Now, it never has appeared from the record how these particular panels of jurors happened to come up at this particular time, so that not one out of sixty would be a Negro, assuming that even the entire five per cent were actually in the box. The use of tickets of different colors in this manner facilitates, among other things, the grouping of Negroes' names so that panels of Negro jurors or panels with a large number of Negro jurors may come up in a few specified cases so that lip service may be rendered to the constitutional provisions against discrimination even to the extent of actually drawing the five per cent of Negroes for

jury service but making it possible so to arrange them that their names would come up in groups which would be immediately identifiable to the clerk in actually furnishing the trial panels so that he could see which panels actually contained Negroes and could see that those panels came up in trivial cases and that in a case of importance involving a Negro and a White person they would not come up.

We are not saying that this is what necessarily happened but it certainly could have happened, as the clerk, in typing the list drawn by the judge, or the deputy sheriff who gave them to the deputy clerk who typed the final list of jurors; could easily have so arranged them. Judge Moore did testify, it will be recalled, that one deputy did "arrange" them. (R. 29). The very fact that, as the judge testified, a jury panel of 12 sometimes contained several Negroes, and that even an entire panel of them occasionally came up (R. 31), indicates that they were so grouped, for the reason that, by the laws of mathematical probability, they would seldom, if ever, come up in groups of more than two or three in any *dozen* jurors, but that two or three Negroes would almost certainly come up in any group of *sixty* jurors. It is plain, of course, that any grouping of this small number of Negroes into a few panels would necessarily cause the great majority of panels to consist of White persons only, so that it would be simple for such panels to be selected in a case of this sort. It would necessarily be harder to do that if all tickets were alike.

The premise for which we insist is that, while the means by which discrimination may be practiced in the selection or arrangement of Negroes in connection with jury duty are as devious as the machinations of the human mind, and while the writing of the names of Negro jurors on tickets similar to those upon which the names of White jurors are written would not necessarily eliminate the practice, yet

until the final result of the jury selection discloses as a mathematical fact that discrimination is not practiced, each method or device that aids or facilitates the possibility of such discrimination must be summarily invalidated.

Argument

I. Georgia Jury Procedure Summarized

This portion of the argument is not argumentative in nature, but consists of a summary of the contents of the applicable statutes of Georgia relating to jury procedure, in the hope that a view of the jury picture as a whole will be of assistance to this Court in determining the issues of the present case. The text of the Georgia Code provisions hereinafter summarized is set out, *supra*, under the heading "Statutory and Constitutional Provisions."

Both grand and traverse jurors in each county are selected by a board of six jury commissioners appointed by the grand jury, with six year terms, two of whose terms expire each two years. (Georgia Code, #59-101). The Clerk of the Superior Court, ex-officio, performs their clerical duties. (Georgia Code, #59-104). The law provides that they revise the jury list every 2 or 3 years; that they select jurors from the tax receiver's books; that they write the names of "upright and intelligent" men on tickets; that, then, from the names on these tickets, they write not over two fifths of the total number on other tickets and that the persons whose names are last written be grand jurors; that these grand jurors be selected from the "most experienced, intelligent, and upright" men contained in the first list; and that the entire first group continues to be petit jurors (Georgia Code, #59-106, #59-701). The law then requires the jury commissioners to place the tickets containing the names of grand jurors in a box with two compartments marked "one" and "two", and those containing traverse jurors in another box (Georgia Code, #59-108, #59-701). It is then the duty

of the clerk to make out in a book lists of the names contained in the grand jury box and the traverse jury box, alphabetically arranged, and to place the book in his office after the lists have been certified by him and the commissioners to contain all the names in each respective jury box (Georgia Code, #59-109).

Both grand and traverse jurors are required to be drawn by judges of the superior courts at the close of each term in open court by removing tickets from compartment No. 1 of their respective box and placing them in compartment No. 2 until compartment No. 2 is filled and then drawing them from compartment No. 2 and placing them back in Compartment No. 1, and so on alternately (Georgia Code, #59-203, #59-701). The clerk prepares a precept or summons for all jurors so drawn, and gives it to the sheriff for service either personally or at the most notorious place of abode of each juror (Georgia Code, #59-206).

The panel to try the case contains 48 jurors in capital felonies (Georgia Code, #59-801) and the Clerk of the Superior Court furnishes a list from which they are selected unless a panel is agreed upon between the parties. The clerk furnishes such additional panels as in his discretion is necessary (Georgia Code, #59-801).

Three copies are made of each panel, one for the prosecution, one to the defense, and one for the clerk, who calls out the names of the jurors in the court who are put upon the accused (Georgia Code, #59-802). The accused has the right to challenge the array by showing that it was not fairly or properly impaneled or ought not to be put upon him. The validity of the challenge is determined by the court (Georgia Code, #59-803).

This, briefly, is the substance of the Georgia system of jury procedure, in so far as it pertains to this case. The only pertinent provision of the Georgia constitution states that the General Assembly should provide for the selection

of the most upright and intelligent men as grand jurors and upright and intelligent men as traverse jurors (Georgia Code, #2-5102).

II. Georgia Law of Rape

Rape is the carnal knowledge of a woman, forcibly and against her will (Georgia Code, #26-1301). It is a felony punishable by death unless the defendant is recommended to mercy, in which case the penalty is set within the limits of 1 to 20 years (Georgia Code, #26-1302). In rape, as in other felony cases where the sentence is less than life imprisonment, the sentence, which provides for a maximum and minimum term of years, is fixed by the jury (Georgia Code, #27-2502).

III. State and Federal Decisions Forbidding Discrimination in Jury Selecton

The Supreme Court of Georgia, itself, has recognized and applied the principle that there must be no racial discrimination in the selection of a jury. In the case of *Crumb* v. *State*, 205 Ga. 547, 54 S. E. 2d 639, the facts presented a clear case of prima facie discrimination, to-wit, that Negroes constituted more than 50 per cent of the population, and approximately 33 per cent of the persons on the tax digest, and that no Negroes had served on the jury for 30 or 40 years. The Supreme Court of Georgia, after reviewing various cases decided by this court which will be hereafter discussed, stated, on page 551:

> "It became the duty of the State to justify such an exclusion as having been brought about for some reason other than racial discrimination."

and, further, on page 552:

> "And whatever may be the individual opinion of the members of this court as to the correctness, sound-

ness, or wisdom of these decisions, it becomes our duty to yield thereto, just as the other courts of this state must accept and be controlled by the decisions and mandates of this court. This being a government by law and not by men, the jury commissioners, in their official conduct are bound by the foregoing rulings of the Supreme Court of the United States, notwithstanding any personal opinion, hereditary instinct, natural impulse, or geographical tradition to the contrary."

The substance of petitioner's contentions is that it failed properly to apply the above quoted principles in the present case. Petitioner recognizes the fact that, as stated on page 550, each case must be decided upon its own particular facts, but respectfully contends that the discrimination in this case, while a little less obvious, is no less certain.

The case of *Neal* v. *Delaware*, 103 U. S. 370, makes it plain on page 394 that discrimination, not necessarily involving absolute exclusion, on account of race in jury selection, is the evil to be corrected. The language of the Court is:

"A denial upon their (state officers') part, of his right to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in *Virginia* v. *Rives*, supra, 'The court will correct the wrong, will quash the indictment, or the panel; or, if not, the error will be corrected in a superior court,' and ultimately in this court upon review.

"We repeat what was said in that case, that while a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as a matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, 'that in the selection

of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.' "

On page 397 of the same case it is said:

"The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of this State,—although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand,—presented a prima facie case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the state court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the state court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United State. Speaking by Mr. Justice Strong, in Ex Parte Virginia, we said, and now repeat, that 'a State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional in-

hibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the state, this must be, or the constituional prohibition has no meaning.' "

This was a case involving an alleged rape by a Negro man upon a White woman.

In Ex Parte Virginia, 100 U. S. 339, it was held that (p. 345):

> "the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offense against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color. We held that immunity from any such discrimination is one of the equal rights of all persons, and that any witholding it by a State is a denial of the equal protection of the laws, within the meaning of the Amendment."

This involved the situation where a Federal statute making the deliberate exclusion of Negroes from juries a misdemeanor offense as against the officer charged with selecting them was held to be constitutional. It will be observed from this case also that discrimination amounts to failure or lack of "indifferent selection" not necessarily amounting to total exclusion.

Likewise, at the same term of the United States Supreme Court, the case of *Virginia v. Rives*, 100 U. S. 313, pointed out that it would be in violation of the Fourteenth Amendment (p. 322):

> "If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty

it is to take the twelve names from the box rejects all the colored jurors for the same reason,—it can with no propriety be said that the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We can not think such cases are within the provisions of section 641. Denials of equal rights in the action of the judicial tribunals of the state are left to the revisory powers of this court."

This case held that the above mentioned section 641 (section 641 of the Revised Statutes), which was a former Federal statute authorizing removal of civil or criminal proceedings to a Federal court where a person could not enforce a legal right in the tribunals of his state because of race, was not applicable to an attempt to remove in the instant case, it appearing that the above enumerated rights were enforcible under the laws of Virginia. This was trial of two Negroes for murder.

Strauder v. *West Virginia*, 100 U. S. 303, was tried at the same term, also, and involved the holding unconstitutional of a statute excluding persons of the Negro race from jury duty. The beneficent purpose of the Fourteenth Amendment can not be better expressed than it is on page 306 of this case:

"At the time when they (the provisions of the Fourteenth Amendment) were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some states laws making such discriminations then

existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States in the states where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by White persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States."

We submit that the facts of the case at bar demand a reversal in the light of the benign and liberal spirit which must govern the application of the law in the light of the foregoing holding. The fact that the discriminaton was practiced in that case by statute and in the case at bar by administrative practice, we respectfully submit, is immaterial. Does not the following additional language on page 307 confirm this:

"What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?"

Was it not held in *Yick Wo* v. *Hopkins*, 6 S. Ct. 1064, 118 U. S. 356, that constitutional administration of laws was as important as the enactment of constitutional laws?

Now, it is further said on page 308 of the Strauder case, supra:

"The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

In this connection, similar comment might be made to the cumulative practices which result in the total absence of Negroes from a trial panel of 60 persons even though Negroes constituted 25 per cent of the total population and 14 per cent of those on the tax digest.

In *Norris* v. *Alabama*, 294 U. S. 587, 55 S. Ct. 579, 580, another Negro rape case, it was said:

"And although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the state through its administrative officers in effecting the prohibited discrimination."

The case of *Carter* v. *Texas*, 177 U. S. 442, 20 S. Ct. 687, as quoted in the *Norris* case, *supra*, on page 580, held:

"'Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him; contrary to the Fourteenth Amendment of the Constitution of the United States'".

The question involved in the case at bar, as in the *Norris* case, *supra*, p. 580, is:

"The application of this established principle (prohibiting discrimination by administrative officers) to the facts disclosed by the record."

The Court further said, there:

"That the question is one of fact does not relieve us of the duty to determine whether in truth a Federal right has been denied. When a Federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also *whether it was denied in substance and effect* (Italics ours). If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, *whenever a conclusion of law of a state court as to a Federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured* (Italics ours)."

That is what we ask this Court to do, to *analyze the facts about the jury selection from the beginning.* We submit that the analysis of the Supreme Court of Georgia was wrong, and that the defendant's life is forfeit as a result.

It should be remembered that, in the *Norris* case, only 6.5 per cent of the population were Negroes, whereas, in the case at bar, 25 per cent were.

In *Pierre* v. *Louisiana*, 59 S. Ct. 536, 306 U. S. 354, we have another case of almost complete exclusion of Negroes. The case of *Hill* v. *Texas*, 316 U. S. 400, 62 S. Ct. 1159, held, on p. 1161:

"Chance or accident could hardly have accounted for the continuous omission of Negroes from the grand jury lists for so long a period as 16 years or more. * * * Discrimination can arise from the action of commissioners who exclude all Negroes whom they do not

know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve."

We respectfully submit that chance could not have accounted for the total absence of Negroes from the panel that tried James Avery.

Other cases in which this Court has applied this vital principle that there shall be no discrimination because of race in the selection of juries have been *Thomas* v. *Texas*, 212 U. S. 278, 282, 283, 29 S. Ct. 393; *In re Wood*, 140 U. S. 278, 285, 11 S. Ct. 738; *Rogers* v. *Alabama*, 192 U. S. 226, 231, 24 S. Ct. 257; *Hale* v. *Kentucky*, 303 U. S. 613, 616, 58 S. Ct. 753; *Gamble* v. *Texas*, 311 U. S. 128, 61 S. Ct. 164. We feel it needless to elaborate on their specific language.

Conclusion

It is respectfully submitted that a writ of certiorari to the Supreme Court of Georgia should be granted, and the conviction reversed.

Respectfully submitted,

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OCTOBER TERM, 1952

No. 648

JAMES AVERY,

Petitioner,

vs.

THE STATE OF GEORGIA

SUPPLEMENTAL BRIEF OF PETITIONER

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